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No. 91-1420

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOAN GROWE, SECRETARY OF STATE
OF THE STATE OF MINNESOTA, ET AL.,
APPELLANTS

v.

JAMES EMISON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

The United States will address the following question:

Whether the district court's finding of a Section 2 violation is based on improper standards and is clearly erroneous.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

This case involves the application of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, to a claim that the drawing of single-member legislative districts results in impermissible dilution of minority voting power. The United States has the primary responsibility for enforcing Section 2, and the decision of the Court in this case will have an important effect on federal enforcement efforts. In addition, the United States has participated either as a party or as an amicus curiae in the Court's previous Section 2 cases. It has also responded to requests from the Court concerning whether certiorari should be granted in cases raising Section 2 issues.

STATEMENT

The State of Minnesota has appealed from a federal district court order establishing new state legislative and federal congressional districts. Our interest is limited to the district court's application of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, to the redistricting of the state legislature. We therefore confine our discussion to that aspect of the case.

1. In 1982, a federal district court issued a redistricting plan for the Minnesota state legislature. J.S. App. A13. The Minnesota legislature adopted that plan as its own in 1983. *Ibid.* Thereafter, in January 1991, Patricia Cotlow and others (Cotlow appellants) brought suit in state court alleging that the legislative districts in the 1983 plan had become malapportioned, and that the state legislature had failed to redistrict based on the 1990 census, in violation of the Fourteenth Amendment to the United States Constitution and Article IV, Section 2 of the Minnesota Constitution. J.S. App. A15 n.5, A17 n.9, A174-A191.

In March 1991, James Emison and others (Emison appellees) brought suit in federal district court against Secretary of State Jane Growe and Carver County Auditor Mark Lundgren (State appellants). J.S. App. A14, A17 n.9. The Emison appellees include three Caucasians, one Native American, one Hispanic, one African-American, and one Asian-American. *Id.* at A14. Like the state court plaintiffs, the Emison appellees alleged that the districting plan contained in the 1983 legislation violated their right to an equal vote under the Fourteenth Amendment. J.S. App. A15. In addition, they claimed that the 1983 plan violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973; according to the Emison appellees, the 1983 plan had the effect, *inter alia*, of diluting

the voting strength of minority voters from Minneapolis by fragmenting them into multiple districts. J.S. App. A5. As relief, they sought the creation of a new legislative district that would unite the minority population in south Minneapolis with nearby minority populations. J.S. App. A15-A16.

In May 1991, the Minnesota legislature passed a bill, known as Chapter 246, establishing a new districting plan for the state legislature. J.S. App. A18. The Governor attempted to veto the bill, but a state court held the veto ineffective. The bill therefore became law. *Ibid.*

In August 1991, Duane Benson and others (Benson appellees) filed suit in federal district court challenging Chapter 246 on constitutional grounds. J.S. App. A17 n.9, A18. The district court consolidated that case with the Emison case already pending before it. The Cotlow appellants (plaintiffs in the state court action), the Minnesota State House of Representatives, and the Minnesota State Senate—all appellants herein—were permitted to intervene in the consolidated action. *Id.* at A17 & n.9.

In October 1991, the state trial court determined that Chapter 246 violated both the state and federal constitutions, and invited the parties to submit remedial plans. J.S. App. A219-A220, A225-A226. Thereafter, the state court adopted a new redistricting plan for the state legislature, and finalized the plan on December 9, 1991. *Id.* at A20, A234-A248, A249-A354. That plan used Chapter 246 as its starting point, modifying it as necessary to correct its constitutional defects. *Id.* at A246-A247, A261-A262. The federal district court stayed the effect of the state court's plan, *id.* at A23, A141-A159, and the State appealed to this Court.

In January 1992, the state legislature enacted a redistricting bill that tracked the state court plan. J.S. App. A23-A24. That bill was vetoed by the Governor. *Id.* at A24. This Court then vacated the federal district court's stay of the state court's redistricting order. *Id.* at A24 n.26, A166-A168. In late January, the state court issued a final order adopting its previously issued redistricting plan. *Id.* at A355-A356. State officials directed local election officials to redraw district lines in accordance with that plan. *Id.* at A371-A372.

2. On February 19, 1992, the federal district court issued its own redistricting order. J.S. App. A11-A70. The court held that the State had violated Section 2 of the Voting Rights Act by failing to create a state senatorial district in Minneapolis with a super-majority of minority voters. J.S. App. A26-A41.[1] For purposes of this holding, minority voters included African-Americans, Asian-Americans, Native Americans, Hispanics, and others. *Id.* at A34.

In reaching this conclusion, the court declined to apply the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), for deciding whether multimember districts result in impermissible dilution of minority votes in violation of Section 2. J.S. App. A28-A30. In particular, the court rejected the portion of *Gingles* requiring plaintiffs to demonstrate the existence of racially polarized voting in the challenged district or districts. Thus, although "[t]he record contain[ed] no statistical evi-

[1] The district court also held that the existing congressional districts violated the "equal representation" standard of Article I, Section 2 of the federal Constitution. J.S. App. A53-A54. The court adopted a congressional redistricting plan prepared by court-appointed special masters. *Id.* at A55-A56.

dence * * * that the minority group is politically cohesive and that bloc voting operates to defeat minority preferred candidates," *id.* at A30 n.30, the court did not view the absence of such evidence as dispositive. *Id.* at A30.

Rather than consider the *Gingles* framework, the court looked to the "totality of the circumstances" in determining whether a Section 2 violation had been shown. J.S. App. A31-A41. Applying the factors set forth in the Senate Judiciary Committee's Report on the 1982 amendment to Section 2, S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982) (Senate Report), the court found that the totality of the circumstances demonstrated a Section 2 violation. J.S. App. A38. In particular, the court believed that "[t]he all-white senate delegation from Minneapolis, the significant proportional underrepresentation of minorities from the overall legislative delegation from Minneapolis, the apparent attempt to protect incumbencies at the expense of minority concentrations, the fragmentation of a geographically cohesive minority population into different senate districts, the educational disadvantage of Minneapolis minorities, [and] the segregation in the Minneapolis school districts," sufficed to establish a Section 2 violation. J.S. App. A38.

The district court also concluded that the state court plan did not remedy the Section 2 violation. J.S. App. A38-A39. In the district court's view, while that plan provided two senate districts in which minorities would have significant influence, the creation of a super-majority minority senate district was necessary to comply with Section 2. J.S. App. A38-A39. The court therefore entered a redistricting plan containing a senate district with a total minority

population of 60% and an African-American population of 43%. *Id.* at A41.[2]

Judge McLaughlin dissented in part. J.S. App. A59-A70. He saw no basis for failing to apply the *Gingles* framework in the context of challenges to single-member legislative districts. *Id.* at A63-A64. Since plaintiffs had failed to establish the existence of those factors, Judge MacLaughlin concluded that they had not met their burden of proving a Section 2 violation. J.S. App. A64.[3]

SUMMARY OF ARGUMENT

Thornburg v. *Gingles*, 478 U.S. 30 (1986), establishes three threshold requirements for plaintiffs seeking to invalidate multimember districts under Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Under *Gingles*, a minority group must prove that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "it is politically cohesive"; and (3) "the white

[2] In developing this plan, the district court did not use Chapter 246 as its starting point. J.S. App. A42-A43. The court concluded that numerous infirmities in Chapter 246, including excessive population disparities and noncontiguous districts, justified discarding it altogether. *Id.* at A43. Instead, the court used the redistricting criteria established in a bipartisan concurrent resolution of the legislature as the basis for drawing its plan. *Id.* at A43-A44.

[3] Judge MacLaughlin also argued that the majority's finding of a Section 2 violation was improper because the parties had never made such a claim with respect to Chapter 246. J.S. App. A63. He further observed that the majority erred in rejecting Chapter 246 in its entirety rather than modifying it only to the extent necessary to remedy its statutory and constitutional defects. J.S. App. A68. Judge MacLaughlin concurred in the majority's resolution of the congressional reapportionment issue.

majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 48-51.

Gingles involved a Section 2 challenge to multimember districts, which possess an inherent tendency to dilute the voting strength of racial and other minorities. 478 U.S. at 47 & n.13; *Rogers* v. *Lodge*, 458 U.S. 613, 616 (1982). This case, by contrast, involves single-member districts. The district court clearly erred in refusing to apply the three *Gingles* preconditions in this case, because the paradoxical effect of its decision is to make single-member districts *more* vulnerable than multimember districts to challenge under Section 2.

The reasons underpinning this Court's recognition of the *Gingles* preconditions in the context of multimember districts apply with equal force to cases involving single-member districts. Absent proof that the plaintiff minority group could form a majority of a single-member district, that group "cannot claim to have been injured by" the challenged districting scheme. *Gingles*, 478 U.S. at 50 n.17. And absent proof of racially polarized voting by minority and majority voters, "it cannot be said that the selection of a [particular] electoral structure thwarts distinctive minority group interests" or "impedes [the minority group's] ability to elect." *Id.* at 51.

The district court's reasons for declining to apply the *Gingles* preconditions in this case are not persuasive. *First*, the fact that a State's interest in preserving an existing multimember districting plan may be more significant than its interest in avoiding boundary changes to a single-member districting plan is of no relevance to the logically prior question of whether plaintiffs can make out a prima facie case of vote dilution in the first place. *Second*, the *Gingles*

preconditions are not judicially created limitations on Section 2 of the type rejected in *Chisom* v. *Roemer*, 111 S. Ct. 2354 (1991), but instead serve to effectuate Congress's intent by affording relief under Section 2 only to those plaintiffs who can prove their entitlement thereto. *Third*, contrary to the district court's assumption, the existence of racial bloc voting cannot be presumed; "plaintiffs must prove it." *Gingles*, 478 U.S. at 46.

ARGUMENT

THE DISTRICT COURT'S FINDING OF A SECTION 2 VIOLATION IS BASED ON IMPROPER LEGAL STANDARDS AND IS CLEARLY ERRONEOUS

1. In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court established the threshold requirements applicable to a claim that the use of multimember districts has diluted the votes of minority group members in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. As a prerequisite to the maintenance of such a claim, a minority group must show that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 48-51. Only after those preconditions have been established should a court consider other relevant factors to determine whether, under the totality of the circumstances, minority group members have been denied an equal opportunity to participate in the political process and to elect representatives of their choice. *Id.* at 77-80.[4]

[4] See, *e.g.*, *East Jefferson Coalition* v. *Parish of Jefferson*, 926 F.2d 487, 491 (5th Cir. 1991); *Jeffers* v. *Clinton*, 730 F. Supp. 196, 209 (E.D. Ark. 1989), aff'd, 111 S. Ct. 662 (1991); *Neal* v. *Coleburn*, 689 F. Supp. 1426, 1434-1437 (E.D. Va. 1988); see also Senate Report 33 (rejecting suggestion that proof of at-large elections, underrepresentation of minorities, and one additional factor such as racially polarized voting would suffice to establish Section 2 violation). But see *Concerned Citizens* v. *Hardee County Bd.*, 906 F.2d 524, 526 (11th Cir. 1990) (suggesting that consideration of the totality of circumstances is optional once the *Gingles* preconditions have been satisfied, because proof of other factors is "'*not essential to*'" a Section 2 claim) (quoting *Gingles*, 478 U.S. at 48 n.15); *Gunn* v. *Chickasaw County*, 705 F. Supp. 315, 320 (N.D. Miss. 1989) (same). Compare *Solomon* v. *Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (en banc) (evenly divided on this question), cert. denied, 111 S. Ct. 670 (1991).

Gingles involved a challenge to the validity of multimember legislative districts, and the Court expressly declined to decide whether the same or additional preconditions applied to suits challenging single-member districts under the Voting Rights Act. 478 U.S. at 47 n.12. The Court recognized, however, that multimember districts by their very nature tend to dilute the voting power of minorities. See *Gingles*, 478 U.S. at 47 & n.13; *id.* at 87 (O'Connor, J., concurring in judgment) ("[T]he at-large or multimember district has an inherent tendency to submerge the votes of the minority."). Indeed, while declining to hold multimember districts *per se* unconstitutional, the Court has repeatedly emphasized the threat that such districts, as distinguished from single-member districts, pose to the ability of minority groups to participate on an equal basis in the political process. See, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 616 (1982); *id.* at 632, 637 (Stevens, J., dissenting); *Wise* v. *Lipscomb*, 437 U.S. 535, 540-541 (1978) (opinion of White, J.); *Connor* v. *Finch*, 431 U.S. 407, 415 (1977); *Whitcomb* v. *Chavis*, 403 U.S. 124, 143-144, 158-159 (1971); see

also *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965). For that reason, the Court has instructed lower federal courts to avoid using multimember districts when devising court-ordered redistricting schemes. *Wise* v. *Lipscomb*, 437 U.S. at 540-541 ("a court-drawn plan should prefer single-member districts over multimember districts, absent persuasive justification to the contrary"); *Connor* v. *Finch*, 431 U.S. at 415 ("single-member districts are to be preferred in court-ordered legislative reapportionment plans").

Viewed in this light, the district court's ruling is clearly wrong. The court refused to apply the *Gingles* preconditions to vote dilution claims involving single-member districts, in effect rendering those districts *more* vulnerable than multimember districts to challenge under Section 2. That result is contrary to this Court's repeated emphasis on the inherent dilutive nature of multimember districts, and is wholly unsupported by either the reasoning of *Gingles* or the language of the Voting Rights Act.[5]

[5] The legislative history of the 1982 amendments to the Voting Rights Act likewise suggests that the *Gingles* factors are applicable across the board, because it makes clear that proof of more than numerical underrepresentation and racial bloc voting is essential to establish a Section 2 violation. See Senate Report 33; 1 *Voting Rights Act: Hearings on S. 53, et al. Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 819-820 (1982) (prepared statement of Armand Derfner, head of the Voting Rights Project) ("amended section 2 * * * applies only in that small category of places where there *is* no functioning system of politics for minority voters, where there is already severe racial division, and where it is simply impossible for minority voters to have any significant *opportunity* under the election system as it is"); accord, *e.g.*, *id.* at 287 (memorandum of Ralph G. Neas, Exec. Dir., Leadership Conf. on Civil Rights) ("the mere failure of minorities to elect a proportion of the

2. The reasons given by this Court for establishing the *Gingles* preconditions in the context of challenges to multimember districts are directly applicable to suits alleging that single-member districts result in impermissible dilution of minority votes. For example, the *Gingles* requirement that the minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U.S. at 50, was explained by the *Gingles* Court on the ground that "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 50 n.17. Both the express terms and the underlying logic of that explanation apply with equal force to dilution cases involving single-member districts. Unless a minority group can demonstrate that it *could* constitute a majority in a single-member district so as to enable it to elect its preferred candidates, the alleged fragmentation of that group's voters into multiple districts could not possibly have denied that group an equal "opportunity * * * to elect representatives of [its] choice." 42 U.S.C. 1973(b). Thus, *Gingles* compels the conclusion that plaintiffs making fragmentation challenges to single-member districts must satisfy the first *Gingles* prong as a threshold requirement.[6]

winners because of racially polarized bloc voting *would not, without more*[,] *establish a violation of Section 2, as amended.* Additional proof of other factors would be required"); *id.* at 564 (testimony of Joaquin G. Avila, Assoc. Counsel, MALDEF); *id.* at 1184 (testimony of Frank Parker, Dir., Voting Rights Project, Lawyers' Comm. for Civil Rights Under Law).

[6] A number of courts have so held. See, *e.g.*, *Turner* v. *Arkansas*, 784 F. Supp. 553, 567-571 (E.D. Ark. 1991) (three-

Similarly, proof of racially polarized voting, including proof of both minority political cohesion and majority bloc voting, is at least as important in fragmentation cases as it is in multimember district cases. As the Court explained in *Gingles*, "[i]f the minority group is not politically cohesive, it cannot be said that the selection of a [particular] electoral structure thwarts distinctive minority group interests." *Gingles*, 478 U.S. at 51. And unless the minority group can demonstrate significant majority bloc voting, it cannot claim that "submergence in a [majority] white * * * district impedes its ability to elect." *Ibid.* In short, without racial polarization, there cannot be racial vote dilution. Until the decision in this case, no court had suggested otherwise.[7]

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judge court), appeal pending, No. 91-1615; *Hastert* v. *State Bd. of Elections*, 777 F. Supp. 634, 654-655 (N.D. Ill. 1991) (three-judge court); *Ewing* v. *Monroe County*, 740 F. Supp. 417, 419 (N.D. Miss. 1990); *Jeffers* v. *Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989) (three-judge court), aff'd, 111 S. Ct. 662 (1991); *Gunn* v. *Chickasaw County*, 705 F. Supp. 315, 318 (N.D. Miss. 1989); *McDaniels* v. *Mehfoud*, 702 F. Supp. 588, 591-592 (E.D. Va. 1988); *Neal* v. *Coleburn*, 689 F. Supp. 1426, 1434-1435 (E.D. Va. 1988); see also *Latino Political Action Comm.* v. *City of Boston*, 784 F.2d 409, 415 (1st Cir. 1986); *Gingles* v. *Edmisten*, 590 F. Supp. 345, 380-381 (E.D.N.C. 1984) (three-judge court), aff'd in part and rev'd in part, *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Contra *Armour* v. *Ohio*, 775 F. Supp. 1044, 1051-1052 (N.D. Ohio 1991). Of course, the requirement that the minority group be sufficiently numerous and compact to constitute a majority of a single-member district may be relaxed where intentional racial discrimination has been shown, see *Garza* v. *County of Los Angeles*, 918 F.2d 763, 770-771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991), but no such showing has been made in this case.

[7] See, *e.g.*, *East Jefferson Coalition* v. *Parish of Jefferson*, 926 F.2d 487, 491-493 (5th Cir. 1991); *Hastert* v. *State Bd. of Elections*, 777 F. Supp. 634, 655 (N.D. Ill. 1991) (three-

3. Applying the *Gingles* framework leads inexorably to the conclusion that appellees failed to establish a Section 2 violation. For although the district court found that a combined minority consisting of African-Americans, Hispanics, Asian-Americans, Native Americans, and others would have the potential to elect candidates of its choice in a single-member district, it found no evidence that this combined minority was politically cohesive or that whites usually vote as a bloc to defeat the combined minority's preferred candidates. See *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (permissible to combine minorities protected by Section 2, but only when the minorities so combined "actually vote together and are impeded in their ability to elect their own candidates" by white bloc voting), cert. denied, 492 U.S. 905 (1989); *Concerned Citizens* v. *Hardee County Bd.*, 906 F.2d 524, 526 (11th Cir. 1990); cf. *Campos* v. *City of Baytown*, 849 F.2d 943 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc) (questioning appropriateness of aggregating different minority groups for purposes of Section 2). Thus, the court effectively conceded that the second and third *Gingles* factors—minority cohesiveness and majority bloc voting—are absent in this case. See J.A. App. A30 n.30.[8]

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judge court); *Ewing* v. *Monroe County*, 740 F. Supp. 417, 419 (N.D. Miss. 1990); *Williams* v. *City of Dallas*, 734 F. Supp. 1317, 1413 (N.D. Tex. 1990); *Jeffers* v. *Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989), aff'd, 111 S. Ct. 662 (1991); *Gunn* v. *Chickasaw County*, 705 F. Supp. 315, 318 (N.D. Miss. 1989); *McDaniels* v. *Mehfoud*, 702 F. Supp. 588, 591 (E.D. Va. 1988); *Neal* v. *Coleburn*, 689 F. Supp. 1426, 1435 (E.D. Va. 1988).

[8] Appellees' failure to prove minority cohesiveness also compels the conclusion that they cannot satisfy the first

The district court did not view appellees' failure to satisfy the *Gingles* preconditions as dispositive. The court gave three reasons for reaching that conclusion. None is persuasive.

First, the district court suggested that since a State's interest in avoiding changes in particular district boundaries is weaker than its interest in avoiding a change from multimember to single-member districts, a different framework for evaluating fragmentation claims might be appropriate. J.S. App. A29 n.29. A State's interest in preserving its electoral system, however, becomes important only after plaintiffs have made a prima facie showing of dilution. It is at that point that a court must assess the totality of the circumstances—including the State's interest in maintaining its present electoral system—and decide whether a Section 2 violation has been proven. See *Houston Lawyers' Ass'n* v. *Attorney General*, 111 S. Ct. 2376, 2381 (1991). In some fragmentation cases, of course, it may well be that a State's interest in preserving its electoral system is insufficient to outweigh the plaintiffs' showing of dilution.

Gingles requirement by aggregating the voting power of different minority groups. Assuming that it is permissible under some circumstances to aggregate different minority groups for purposes of determining whether a majority-minority single-member district could be created, such aggregation is clearly improper absent proof that those different minority groups together exhibit cohesive voting patterns. *Romero* v. *City of Pomona*, 883 F.2d 1418, 1426-1427 (9th Cir. 1989), overruled in part on other grounds, *Townsend* v. *Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir. 1990) (en banc); *Brewer* v. *Ham*, 876 F.2d 448, 453-454 (5th Cir. 1989). The record is devoid of evidence that any single minority group can constitute a majority of the voting age population of any single-member legislative district in Minneapolis. See J.S. App. A380-A381, A383-A384.

But that does not justify relieving plaintiffs of their initial burden of making a prima facie showing of dilution.

Second, the district court concluded that this Court's decision in *Chisom* v. *Roemer*, 111 S. Ct. 2354 (1991), had undercut *Gingles* because it "reject[ed] the use of judicially created limitations to restrict coverage under Section 2." J.S. App. A29-A30. In *Chisom*, the Court declined to exempt elected judges from the scope of Section 2 in the absence of any indication that Congress had intended to achieve that result when it amended the statute in 1982. 111 S. Ct. at 2368. The *Gingles* preconditions, by contrast, serve to "effectuate[] the intent of Congress," 478 U.S. at 48-49 n.15, by limiting relief under Section 2 to those plaintiffs who can demonstrate that they have in fact been deprived of an equal opportunity to participate in the electoral process and elect representatives of their choice. As the Court stated in *Gingles*, "[b]y recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that [Section] 2 plaintiffs prove their claim before they may be awarded relief." *Ibid.* Likewise, by requiring plaintiffs to satisfy the first *Gingles* precondition, the Court merely assures that relief under Section 2 will be limited to those minority groups that have actually been injured by the challenged structures or practices. 478 U.S. at 50 n.17. Thus, the *Gingles* preconditions do not artificially limit the right created by Congress in Section 2, but instead implement that right through judicially manageable standards.

Finally, the district court intimated that racial polarization should not have to be proven because it exists in most jurisdictions. J.S. App. A30 n.30. But

as the Court explained in *Gingles*, the "results test does not assume the existence of racial bloc voting; plaintiffs must prove it." 478 U.S. at 46; see Senate Report 33-34. Indeed, *Gingles* holds that Section 2 requires a district-specific inquiry into bloc voting. For that reason, it is improper to use state-wide bloc voting patterns to infer that there is bloc voting in particular districts. 478 U.S. at 59 n.28. It follows *a fortiori* that it is improper to use assumptions about nationwide bloc voting to infer that there must be bloc voting in particular districts.

This is not to suggest that the issues of minority cohesion and majority bloc voting must always be addressed through statistical evidence, as the district court may have assumed. J.S. App. A30 n.30. *Gingles* makes clear that statistical evidence is just one way to prove or disprove the existence of racial polarization. 478 U.S. at 56, 57 n.25; see also *Sanchez* v. *Bond*, 875 F.2d 1488 (10th Cir. 1989), cert. denied, 111 S. Ct. 340 (1990). But plaintiffs must produce probative evidence of some kind sufficient to support a finding that the minority group is politically cohesive and that whites usually vote sufficiently as a bloc to defeat their candidates. Since appellees failed to do that, the district court's finding of a Section 2 violation should be reversed.[9]

[9] Appellants argue that even if there were a Section 2 violation, the district court should not have issued a redistricting plan that differed so substantially from Chapter 246. Instead, appellants contend, the district court should have modified Chapter 246 (as corrected by the state court) only to the extent necessary to remedy the Section 2 violation. J.S. 21-23; see *Upham* v. *Seamon*, 456 U.S. 37 (1982). Since the finding of a Section 2 violation cannot stand, there is no need for the Court to reach this issue.

CONCLUSION

The district court's finding of a Section 2 violation and its order redistricting the state legislature should be reversed.

Respectfully submitted.

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